6-2000-8871-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Commissioner's Order Denying Permit Application 93-1024; Project No. 19 of the Red Lake Watershed District (Maple Lake Dam, Judicial Ditch #73, Mitchell Lake Dam, Badger Lake Dam, Poplar River Diversion Dam, Tamarack Lake Dam, Polk Impoundment, and Poplar River Dam), Polk County.

ORDER RECOMMENDING SUMMARY DISPOSITION

On May 31, 1994, a Notice and Order for Hearing was issued by the Commissioner, setting a hearing date of August 23.

On June 29, 1994, the Department filed a motion for dismissal or summar judgment, along with a supporting affidavit and a memorandum.

On July 12, 1994, the Watershed District filed an objection to the Department's motion, along with a supporting affidavit and a memorandum. Th memorandum included some past correspondence between the Department and the Watershed District.

On July 13, 1994, the Administrative Law Judge and counsel for both parties held a prehearing conference telephone call. During that call, the Administrative Law Judge requested the Agency to supply him with additional materials from the Agency's files. He directed the Agency to supply opposin counsel with copies of the documents supplied, and offered the Watershed District the opportunity to respond to them.

On July 18, 1994, the Department supplied the Administrative Law Judge with a copy of the Watershed District's permit application, an aerial photograph of the area, an engineering report prepared by the Watershed District, and a page from the transcript of a 1975 public hearing concerning

the rule at issue in this motion. For purposes of this motion, the record closed on July 18.

The Department is represented by Assistant Attorney General Donald A. Kannas, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155. The Watershed District is represented by Neil A. McEwen, Attorney at Law, P.O. Box 220, Thief River Falls, Minnesota 56701.

This Report is a recommendation, not a final decision. The Commissione will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of th Commissioner shall not be made until this Report has been made available to

the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions present argument to the Commissioner. Parties should contact the Commission to ascertain the procedure for filing exceptions or presenting argument.

Based on all of the files and proceedings herein, and for the reasons s forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Department's motion for summary judgment be GRANTED, and that permit application be DENIED.

Dated this 12th day of July, 1994.

s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

MEMORANDUM

I.

The Watershed District has applied for a permit to work in public wate The application was dated July 23, 1992, and received by the Department on J 24, 1992. However, the history of the project goes back many years. The project has been around, in one form or another, since the 1920s. The curre version is described in an engineering report prepared by the Watershed District dated June 14, 1989. Following two years of discussions and negotiations, the Commissioner essentially denied the application. The Watershed District requested a hearing on the denial. A Notice of Hearing w issued, but the Department has now filed a motion for summary disposition.

A motion for summary disposition is analogous to a motion for summary judgment under Rule 56 of the Rules of Civil Procedure. The same standards apply. Minn. Rules, pt. 1400.5500 K (1993). Summary disposition of a clai appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minn. Rule Ci P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955). A material fac is one which is substantial and will affect the result or outcome of the proceeding, depending upon the determination of that fact. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984), rev. denied, February 6, 1985. When considering a motion for summary

disposition, the evidence must be viewed in the light most favorable to the non-moving party. Grondahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); America Druggist Ins. v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. App. 1989).

With a motion for summary disposition, the initial burden is on the mov party to show facts establishing a prima facie case for the absence of

material facts at issue. Theile v. Stick, 425 N.W.2d 580, 583 (Minn. 1988) Here, the Department has met its burden with the supporting affidavit and exhibits, which establish that the Watershed District does not have sufficie ownership interest in the land to allow it to build its proposed project.

Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire & Casualty Co. v. Retrum, 456 N.W.2d 719, 723 (Minn. A 1990). To successfully resist a motion for summary disposition, the non-mov party must show that there are specific facts in dispute which have a bearin on the outcome of the case. Hunt v. IBM Mid-America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn. Rules Civ. P. 56.05. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989). The evidence introduced to defeat a summary disposition motion need not be admissible as trial evidence, however. Carlisle, 437 N.W.2d at 715. In thi case, the Watershed District has failed to meet its burden. It argued that ownership issue was irrelevant and that the Department's rule (requiring ownership) was ineffective in this case.

Solely for purposes of considering the motion, the Administrative Law Judge has assumed the following facts to be true:

1. That a part of the proposed project involves construction of earthen embankments or dikes in sections 24, 25 and 36 of Badger Township, Polk County.

2. That those same three sections would also be the site of flood storage impoundments designed to retain floodwaters.

3. That the Department owns lands in those three sections which are used as part of the Polk Wildlife Management Area. At least some of the dikes and impoundment would be on Department-owned lands which are part of the Area.

4. That the Department has determined that it is unwilling to sell, lease, exchange, grant easements, or otherwise allow the use of its lands for the dikes or the flood storage.

Assuming those facts to be true, for purposes of this motion, the Administrative Law Judge concludes that the application must be denied becau the Watershed District cannot obtain the necessary property rights to proce with the project. Even if the Watershed District prevailed in a hearing on merits, and a permit were granted, the permit would be worthless. Without t property rights, the project cannot go forward.

Minn. Rules, pt. 6115.0240, subp. 2 (1993) provides, in part, as follow

Applications shall be submitted by the riparian owner of the land on which a project is proposed, except:

A. A governmental agency, public utility, or corporation authorized by law to conduct the project may apply if the property rights acquired or to be acquired are fully described in the application.

The Administrative Law Judge finds the application of the rule to this situation to be unclear. Therefore, extrinsic aids such as "legislative history" and the administering agency's own interpretation are appropriate a in ascertaining intent. Minn. Stat. § 645.16 (1992).

When an agency's construction of its own regulation is at issue, considerable deference should be given to the agency's interpretation, especially when the relevant language is unclear or susceptible to different interpretations. If the regulation is ambiguous, the agency interpretation will generally be upheld if it is reasonable. But if the regulation is not ambiguous, no deference is given to the agency interpretation and the court substitute its own judgment. Application of Q Petroleum, 498 N.W.2d 772, 7 (Minn. App. 1993), citing St. Otto's Home v. Minnesota Department of Human Services, 437 N.W.2d 35, 39 (Minn. 1989).

The DNR rule was initially adopted in 1976. The Department indicates there is no "legislative history" to assist in its interpretation, other tha the following excerpt from an introductory statement given at the public hearing on December 29, 1975 when the rule was proposed for adoption:

> Are there any questions on page 1?
>
> There being no questions, I will proceed to the second page, which talks about the applications for permits under the law and who may apply.
>
> Now, the applications must ordinarily be submitted by the riparian owner of the land adjacent to the surface water body such as a lake or stream, or by the owner of the land overlying a ground water aquifer in the case of water appropriation. Provided, however, that a governmental agency authorized by law to conduct the contemplated type of project may apply if the easements or other property rights acquired or to be acquired are properly obtained by that governmental agency. (Emphasis added.)

The Department argues that the Watershed District cannot meet the rule, and thus there is no reason to go forward with the hearing on the merits. The Department, relying on its affidavit, argues that the rule requires an applicant to have a sufficient legal interest in the land to be able to construct what has been applied for. In the case of a governmental agency, can apply for a permit if it is authorized to conduct the project and if property rights to be acquired are fully described in the application. The Department argues that an agency with condemnation authority or, at the very least, deep enough pockets to make the future acquisition a mere formality, the kind of agency contemplated by the rule. The Department reads the rule require permit processing only if the applicant has, or is assured of

acquiring, the necessary interest in land to complete the project. Based u
its affidavit, the Department argues that in this case, the Applicant does
have any assurances that it will be able to acquire such interests and, in
fact, the Applicant has assurances it will not be able to acquire the neces
interests in the land. Therefore, the Department argues, there is no reaso
go through the hearing process. The rule is designed to avoid wasting time
money on unrealistic or impossible applications.

The Applicant responds to the motion by arguing that the question of real estate interests is a collateral matter to its underlying right to a hearing the application, and the land ownership question will have to be resolved in different or separate proceeding. The gist of the Applicant's position is t it has applied for a permit, the application has been denied, and it has an absolute right to a hearing on the merits of the application. The Applicant argues that the rule regarding interests in land has no application in this case, and that the Applicant has done everything necessary to entitle it to hearing on the underlying issues such as the project's effects on water quality, effects on wildlife, concerns about water flows and wetlands, and similar issues. Consistent with this position, the Watershed District's affidavit and supporting exhibits take the position that the decision on thi motion is governed solely by Minn. Stat. § 103G.311, subd. 5 (1992), which provides that if a hearing is waived and an application is denied, then the applicant may file a demand for a hearing and the commissioner must hold a hearing on the application.

Minn. Stat. § 103G.301, subd. 1 (1992) requires that an application for permit be accompanied by "other data the commissioner may require". Minn. Stat. § 103G.315, subd. 15 (1992) authorizes the Commissioner to adopt rules "prescribing standards and criteria for issuing and denying . . . public wat work permits . . . ." Pursuant to that grant of authority, the Commissioner has adopted a substantial body of rules regarding permits and the applicatio process. The rule relied on by the Department, Minn. Rule pt. 6115.0240, is among them. The rule has been in effect since 1976, and there is no indicat that it has been declared invalid or otherwise inoperable. A valid rule has the force and effect of law. Minn. Stat. § 14.38 (1992).

While the wording of the rule is ambiguous, its intent can be inferred from the brief transcript excerpt cited above. A permit from the Department does not authorize a trespass on property. The Department has a legitimate concern in limiting its permit review activities to projects which will not thwarted by ownership disputes. Therefore, the Department has adopted its rule, limiting applicants to owners of the land where a project will be buil The rule provides an exception, however, for governmental agencies and other who are authorized by law to conduct such projects. For example, a watershe district has the power of eminent domain, and thus can condemn land, if necessary, to construct a project. Minn. Stat. § 103D.335, subd. 1 (3) (1992). However, that power is circumscribed in situations where a watershe district would seek to condemn state-owned land. While the Administrative L Judge is not aware of any Minnesota cases determining the powers of a waters district to condemn state-owned land currently in use as a wildlife manageme area, certain principles that would guide such a decision can be ascertained from existing cases.

The condemnation of an easement through a state park to construct a pow line was disallowed because it was inconsistent with the existing public use

Minnesota Power & Light Co. v. State, 177 Minn. 343, 225 N.W. 164 (1929). State lands cannot be condemned unless the right to so acquire them is expressly or by necessary implication granted by the Legislature. In re Condemnation of Lands in St. Louis County, 124 Minn. 271, 144 N.W. 960 (1914).

Exercise of eminent domain power over property already devoted to publi use requires specific statutory authorization when the use planned for the

property by condemnor is inconsistent with its current use. City of Shakopee v. Minnesota Valley Elec. Co-op, 303 N.W.2d 58 (1981). But the condemning authority is the sovereign -- that is, the United States or t state -- and it seeks to acquire property for its own use, generally it is h that there is a public purpose for the taking even if the subject property i already put to public use by a lower level government. Generally, the sovereign is presumed to have a superior public purpose for ownership of rea estate as compared with inferior units of government seeking to acquire real estate. State v. Christopher, 284 Minn. 233, 170 N.W.2d 95 (1969). In the Christopher case, the state proposed to condemn city park property for trunk highway purposes. The city contended that the land was already devoted to a public use and thus could be condemned for another public purpose only when expressly authorized by law or authorized by necessary implication of the controlling statute. The city urged that the condemnation should not be allowed. The Court disagreed, pointing out that the city was relying on cas which apply to condemnors "in the lower echelons of entities having the righ of eminent domain". The Court explained that not all condemnors "in the hierarchy of entities" having the power of eminent domain enjoy the same rig and powers. The Court stated: "The powers of the state are preeminent beca of the state's sovereign authority. It is not correct to equate the sovere right of the state to condemn land for a public purpose with rights of lesse subdivisions of the government or public or private utility corporations to exercise the right of eminent domain." State v. Christopher, at 170 N.W.2d

Since the existing public use, and the ownership of the land, are both controlled by the State, the Watershed District could not condemn the land, especially for a use that would be inconsistent with the current state use.

The Department is unwilling to voluntarily transfer the lands, or allow them to be used for the project. Therefore, the Department's rule prohibits the application from proceeding further.

Common sense also supports the denial at this stage. The hearing, if it were to be held, would not be simple or short. The process of getting a fin decision on this application would involve substantial time and expense for both the Watershed District and the Department. Both are taxpayer-funded entities. It makes no sense to spend that money if the project cannot be built. Even if the Watershed District prevails at every stage of the permit process, it will still end up with a permit that cannot be used. The purpos of the Department's rule is to avoid such a waste.

II.

This project is a multi-element proposal. The portions of the project which would require the use of state-owned land in the Polk Wildlife Manage Area are precluded by the Department's decision not to allow them to be used

for the project. There are other portions of the project, however, which do not require the use of state-owned lands. The District may want to consider revising its project to avoid the state-owned lands, and resubmitting it. Nothing in this Order would preclude such a revision and resubmittal.

AWK